FILED
SUPREME COURT
STATE OF WASHINGTON
12/21/2018 2:46 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
1/2/2019
BY SUSAN L. CARLSON
CLERK

NO. 96189-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

THE CITY OF EVERETT AND THE WASHINGTON DEPARTMENT OF LABOR & INDUSTRIES,

Petitioners.

AMICUS BRIEF IN SUPPORT OF RESPONDENT

WORKERS' INJURY LAW & ADVOCACY GROUP (WILG)

Kathleen G. Sumner
Chair, WILG Amicus Committee
Law Offices of Kathleen G. Sumner
P.O. Box 250
Hampstead, NC 28443-0250
N.C. State Bar No. 17733
Phone: (336) 294-9388
sumnerlaw@aol.com

Amie C. Peters
WSBA No. 37393
Blue Water Legal PLLC
P.O. Box 83
Edmonds, WA 98020
Phone: (425) 361-2054
Fax: (866) 345-9030
amie@bluewaterlegal.com

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

III. IDENTITY AND INTEREST OF AMICUS CURIAE WILG

Amicus curiae Workers' Injury Law & Advocacy Group [WILG] is a national non-profit membership organization dedicated to protecting and advocating the rights of injured workers throughout the United States. WILG represents the interests of millions of workers and their families who, each year, suffer the consequences of workplace injuries and illnesses. WILG works principally to assist attorneys and non-profit groups in advocating the rights of injured workers through education, communication, research, amicus briefs, and information gathering. WILG, founded in 1995, represents an important, national voice for workers. WILG's members are committed to improving the quality of legal representation to those employees, regardless of legal status, who are injured on the job or who are victims of occupational disease, through superior legal education and through judicial and legislative activism.

IV. ISSUE OF INTEREST OF *AMICUS CURIAE* WILG

The issue of interest to WILG is:

Whether the Court of Appeals properly concluded that neither collateral estoppel (issue preclusion) nor res judicata (claim preclusion) should bar Mr. Weaver from pursuing his claim for permanent total disability benefits, where the application of these equitable doctrines

would work an injustice against him; and whether the court of appeals opinion in this case is consistent with the jurisprudence of other jurisdictions concerning the application of these equitable doctrines?

V. ARGUMENT

In its Opinion in this case, the Court of Appeals held that the equitable doctrine of collateral estoppel (issue preclusion) did not bar Mr. Weaver from pursuing his claim for permanent total disability benefits, because application of this equitable doctrine would result in a manifest injustice. *Weaver v. City of Everett*, 4 Wash. App. 2d 303, 319, 421 P.3d 1013, 1021 (2018). In its discussion of the equitable doctrine of *res judicata* (claim preclusion); however, the Court failed to explicitly recognize that invocation of this equitable doctrine—as opposed to the equitable doctrine of collateral estoppel (issue preclusion)—is inappropriate where such application would result in manifest injustice. The Court of Appeals did, however, recognize that collateral estoppel (issue preclusion) and *res judicata* (claim preclusion) are both common law equitable doctrines to which equitable principles, such as manifest injustice, should apply. Thus, WILG respectfully submits that the invocation of the equitable doctrine of *res judicata* (claim preclusion) should also be subject to the same equitable requirement that it shall not result in manifest injustice.

In this case, the Court of Appeals set forth the elements of collateral estoppel (issue preclusion) as follows: "(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) *application of the doctrine does not work an injustice*." *Weaver v. City of Everett*, 4 Wash. App. 2d 303, 315, 421 P.3d 1013, 1019 (2018) (citations omitted) (emphasis in original). Quoting from the Washington Supreme Court's decision in *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001), the Court noted that:

> Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice." *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). Application of the doctrine works an injustice on a party when, during an earlier proceeding, that party did not have a "'full and fair opportunity'" to litigate the contested issue. *LeMond*, 143 Wn. App. at 803-04 (internal quotation marks omitted) (*quoting Barr*, 124 Wn.2d at 324-25). Indeed, for collateral estoppel to apply, the party must have had "sufficient motivation for a full and vigorous litigation of the issue." *Hadley*, 144 Wn.2d at 315.

Weaver v. City of Everett, 4 Wash. App. 2d 303, 316, 421 P.3d 1013, 1019 (2018).

In *Hadley,* the defendant, Helen Maxwell, challenged the trial court's holding that she was collaterally estopped to deny liability in a

motor vehicle accident case because she was unsuccessful in contesting a citation for a lane change violation, a traffic infraction. In appealing to this Court, Maxwell challenged the application of collateral estoppel on the basis that its application constituted an injustice. This Court explained that

> To determine whether an injustice will be done, respected authorities urge us to consider whether "the party against whom the estoppel is asserted [had] interests at stake that would call for a full litigational effort." 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE, CIVIL § 373, at 763 (5th ed. 1996); *see also Parklane*, 439 U.S. at 330 (holding incentive to vigorously contest cases with small or nominal damages at stake could be a reason not to apply collateral estoppel); *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110, 119 (1995) (holding collateral estoppel for misdemeanor traffic offenses generally inappropriate); *Rice v. Massalone*, 554 N.Y.S.2d 294, 160 A.D.2d 861 (1990) (holding collateral estoppel inappropriate after an administrative determination of liability for a traffic accident).

Hadley v. Maxwell, 144 Wash. 2d 306, 312, 27 P.3d 600, 602-03 (2001). Accordingly, this Court held that because Maxwell had little incentive to fully and vigorously litigate the traffic infraction, it would be a manifest injustice to preclude her from contesting her liability at the subsequent civil action. Thus, it is well established in this State that the equitable doctrine of collateral estoppel (issue preclusion) will not be invoked where such application will result in manifest injustice.

In the case at bar, the Court of Appeals, relying upon *Hadley*, properly held that the department and the city failed to establish that the application of the equitable doctrine of equitable estoppel (issue preclusion) would not work an injustice against Mr. Weaver. The Court of Appeals reasoned that the expense of litigation would likely exceed the amount of benefits at stake in Mr. Weaver's earlier application for temporary total disability benefits. *Weaver v. City of Everett,* 4 Wash. App. 2d 303, 318, 421 P.3d 1013, 1020 (2018). Thus, the Court concluded that Mr. Weaver lacked sufficient motivation to fully and vigorously contests his initial compensation claim. Therefore, the Court of Appeals held that application of the equitable doctrine of collateral estoppel (issue preclusion) to prevent him from litigating the issue of whether his employment caused his cancer in his subsequent application, works an injustice to him.

As set forth above, in the Court of Appeals Opinion in *Weaver*, the Court did not explicitly recognize that invocation of the equitable doctrine of *res judicata* (claim preclusion)—as opposed to collateral estoppel (issue preclusion)—is inappropriate where application of the equitable doctrine of *res judicata* (claim preclusion) would result in manifest injustice. In fact, the courts of this State appear to have never explicitly held that application of the equitable doctrine of *res judicata* (claim preclusion)

shall not result in manifest injustice. However, in *Fields Corp. v. Labor & Indus.*, 112 Wn. App. 450, 45 P.3d 1121 (2002), the Court of Appeals held that equitable relief from *res judicata* (claim preclusion) is not limited to the narrow circumstances in which a claimant is either incompetent or illiterate. *Fields Corp. v. Labor & Indus.*, 112 Wn. App. 450, 459, 45 P.3d 1121, 1126 (2002). The *Fields* Court recognized that the Court's equitable powers permit the Court to grant relief under other circumstances. *Id.* The Court of Appeals decision in *Weaver* is consistent with the jurisprudence of other jurisdictions on this issue.

An overwhelming number of jurisdictions that have considered the application of the equitable doctrine of collateral estoppel (issue preclusion), agree with the Washington Appellate Courts' holding that collateral estoppel (issue preclusion) is a flexible doctrine and should only be applied where the issue in dispute has been fully and fairly litigated. *See, Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001) (a full and fair opportunity to litigate an issue requires not only the availability of procedures in the earlier proceeding commensurate with those in the subsequent proceeding, but also that the party against whom collateral estoppel is asserted have had the same incentive to vigorously defend itself in the previous action; a party necessarily lacks the same incentive to defend where its exposure to liability is substantially less at the earlier

proceeding); *Kelly v. Trans Globe Travel Bureau, Inc.*, 60 Cal. App. 3d 195, 131 Cal. Rptr. 488 (1976) (collateral estoppel is not an inflexible, universally applicable principle; rather policy considerations may limit its use where the limitation on relitigation underpinnings of the doctrine are outweighed by other factors); *Nash v. Workers' Comp. Appeals Bd.*, 24 Cal. App. 4th 1793, 30 Cal. Rptr. 2d 454 (1994) (it has been said that collateral estoppel is based on equitable principles, and that the issue in question must have been sufficiently litigated in the prior forum to produce a firm and conclusive resolution); *De Simone v. S. African Marine Corp., S.A. Morgenster*, 82 A.D.2d 820, 439 N.Y.S.2d 436 (App. Div. 1981) (the party against whom collateral estoppel is asserted, or his privy, must have been given a full and fair opportunity to litigate in a prior proceeding the issue sought to be precluded in the subsequent proceeding); *Grant v. GAF Corp.*, 415 Pa. Super. 137, 608 A.2d 1047 (1992) (issue preclusion prevents re-litigation of an issue where the party against whom it is used or one in privity with that party had a full and fair opportunity to litigate the issue in a prior action); *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 476 N.E.2d 595 (1985) (the standard generally applied to determine whether to preclude a party from relitigating an issue with a person not a party in the earlier action is whether the party "lacked full and fair

opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue).

Other jurisdictions have not analyzed this issue in terms of collateral estoppel (issue preclusion), but have instead invoked the doctrine of the law of the case. Nevertheless, these Courts agree that the doctrine, whatever it is called, must be flexibly applied. For example, in *Garrett v. The Goodyear Tire & Rubber Co.*, 817 S.E.2d 842 (N.C. Ct. App. 2018), the North Carolina Court of Appeals stated that "[t]he doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a flexible discretionary policy which promotes the finality and efficiency of the judicial process." *Garrett v. The Goodyear Tire & Rubber Co.*, 817 S.E.2d 842, 849 (N.C. Ct. App. 2018) (citation omitted).

As to the equitable doctrine of *res judicata* (claim preclusion), many jurisdictions have extended the manifest injustice requirement to this doctrine as well, and have explicitly held that *res judicata* (claim preclusion) will not be invoked where it will result in a manifest injustice. *Flesche v. Interstate Warehouse*, 411 So. 2d 919 (Fla. Dist. Ct. App. 1982) (there are recognized exceptions in the application of the doctrine of *res judicata*, one of which is that it will not be invoked where it will work an injustice); *Jacobs v. Teledyne, Inc.*, 39 Ohio St. 3d 168, 529 N.E.2d 1255

(1988) (while *res judicata* does apply to administrative proceedings, it should be applied with flexibility, and the doctrine should be qualified or rejected when its application would contravene an overriding public policy or result in manifest injustice); *Hubbard v. SWCC & Pageton Coal Co.*, 170 W. Va. 572, 295 S.E.2d 659 (1981) (while the doctrine of *res judicata* is applicable to workmen's compensation cases, that doctrine is not rigidly enforced where to do so would defeat the ends of justice); *Wood v. Fabricators, Inc.*, 189 Mich. App. 406, 473 N.W.2d 735 (1991) (wholesale application of *res judicata* would bar the employee from later raising a total and permanent disability claim, even though the claim might have acquired merit through passage of time).

VI. CONCLUSION

For the foregoing reasons, and as set forth above, WILG respectfully submits that the Court of Appeals in the case at bar properly held that the equitable doctrine of collateral estoppel (issue preclusion) did not bar Mr. Weaver from pursuing his claim for permanent total disability benefits, because application of this equitable doctrine would result in manifest injustice. Moreover, WILG respectfully submits that this Court should join the courts of other jurisdictions, and explicitly hold that the equitable doctrine of *res judicata* (claim preclusion) should not be invoked where, as in this case, it will result in manifest injustice.

DATED this 21st day of December, 2018

Amie C. Peters
AMIE C. PETERS

Amie C. Peters WSBA 37393 for
KATHLEEN G. SUMNER

On Behalf of WILG

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2018, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal, which will send notification of such filing to all counsel of record herein.

William Alexander Masters	bmasters@wkmcblaw.com; kb@wkmcblaw.com
Thomas Jeffrey Keane	tjk@tjkeanelaw.com; dmp@tjkeanelaw.com
Alexander Yurivich Jouravlev	alexanderj@atg.wa.gov
Marne J Horstman	mhorstman@prattdaystratton.com
Anastasia R. Sandstrom	anas@atg.wa.gov
John Klor	jklor@wkmcblaw.com
Kristopher Ian Tefft	kris.tefft@WSIAssn.org
Julie Sund Nichols	julie@whitehousenichols.com
Seattle Labor & Industries A.G. Office	lnisearecept@atg.wa.gov

Amie C. Peters, WSBA #37393
WILG

BLUE WATER LEGAL PLLC

December 21, 2018 - 2:46 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96189-1
Appellate Court Case Title:	Michael Weaver v. City of Everett, et al.
Superior Court Case Number:	16-2-02373-6

The following documents have been uploaded:

- 961891_Briefs_20181221144410SC021574_8500.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was WEAVER AMICUS BRIEF 2018-12-21.pdf
- 961891_Motion_20181221144410SC021574_5876.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was WEAVER AMICUS MOTION 2018-12-21.pdf

A copy of the uploaded files will be sent to:

- alexanderj@atg.wa.gov
- amie@bluewaterlegal.com
- anas@atg.wa.gov
- bmasters@wkmcblaw.com
- dmp@tjkeanelaw.com
- jklor@wkmcblaw.com
- julie@whitehousenichols.com
- kb@wkmcblaw.com
- kris.tefft@WSIAssn.org
- lnisearecept@atg.wa.gov
- mhorstman@prattdaystratton.com
- sumnerlaw@aol.com
- tjk@tjkeanelaw.com

Comments:

Sender Name: Amie Peters - Email: amie@bluewaterlegal.com
Address:
PO BOX 83
EDMONDS, WA, 98020-0083
Phone: 425-361-2054

Note: The Filing Id is 20181221144410SC021574